Supreme Court

October Term, 19[illegible]

No. 74-[illegible]

ROSEMARY DOCKERY and RONALD BOYD, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

JOHN S. BOYLE, in his capacity as the general administrative authority for the Circuit Court of Cook County, and representing all those persons who from time to time hold office as Judges of the Circuit Court of Cook County, who are sued in, but only in, the capacity in which they exercise the authority granted by Ill. Rev. Stat., 1971, Ch. 34, §§5601-5608,

Respondents.

(On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit)

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1973

No. 73-5408

ROSEMARY DOCKERY and RONALD BOYD, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

JOHN S. BOYLE, in his capacity as the general administrative authority for the Circuit Court of Cook County, and representing all those persons who from time to time hold office as Judges of the Circuit Court of Cook County, who are sued in, but only in, the capacity in which they exercise the authority granted by Ill. Rev. Stat., 1971, Ch. 34, §§5601-5608,

Respondents.

(On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit)

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. Section 1254(1). Petitioners improperly invoke this Court's jurisdiction under 28 U.S.C. Sections 1253, 2103.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit properly dismissed for lack of jurisdiction petitioners' appeal from a ruling by a three judge District Court dismissing their Complaint for declaratory and injunctive relief.

2. Whether this Court has jurisdiction under 28 U.S.C. Sections 1253, 2103.

3. If this Court determines it has jurisdiction pursuant to 28 U.S.C. Sections 1253, 2103 the following issue is presented. Whether the Illinois statutory scheme creating the Public Defender is unconstitutional in that it places that office under the jurisdiction of the state judiciary.

4. Whether petitioners should be allowed to proceed *in forma pauperis.*

STATUTES INVOLVED

Federal Statutes; 28 U.S.C., Sections 1253, 1254(1) and 2103.

Illinois Revised Statutes, 1971, Chapter 34, Sections 5601-5608. These sections are set forth in Appendix B of the Petition.

STATEMENT OF THE CASE

Plaintiffs' (petitioners), complaint for declaratory and injunctive relief contests the constitutionality of the Illinois Public Defender Act (Ill. Rev. Stats., 1971, Ch. 34, Sections 5601-5608).

Plaintiffs seek to represent a class consisting of all indigent defendants awaiting trial in criminal cases who are represented by the Public Defender. The thrust of the complaint is that administrative control of the Public De-

fender's office by the state judiciary deprives plaintiffs of their constitutional right to effective counsel.

On November 24, 1972 a properly convened three judge court for the Northern District of Illinois dismissed plaintiffs' action. On February 7, 1973 the Court denied plaintiffs' motion to alter or amend the order of dismissal.

Plaintiffs appealed the dismissal to the United States Court of Appeals for the Seventh Circuit. On May 24, 1973 the Appellate Court in a written opinion dismissed the appeal for lack of jurisdiction. (Appendix, A-21 of Petition). On June 12, 1973 the Court of Appeals denied rehearing. (Appendix, A-23 of Petition).

Petitioners seek reversal of the Seventh Circuit's dismissal of their appeal. Jurisdiction for this aspect of the matters is based on 28 U.S.C. 1254(1). Alternatively, petitioners ask this Court to treat their petition as a jurisdictional statement pursuant to 28 U.S.C. 1253 and 2103, and review the merits of the District Court's ruling. Additionally, petitioners seek leave to proceed *in forma pauperis.*

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY DISMISSED PETITIONERS' APPEAL FOR LACK OF JURISDICTION.

A.

The District Court's Order Granting Respondents' Motion To Dismiss Denied Petitioners' Prayer For Both Declaratory And Permanent Injunctive Relief.

This action for declaratory and injunctive relief contests the constitutionality of the Illinois Public Defender Act. (Ill. Rev. Stats., 1971, Ch. 34, Sections 5601-5608). A three judge panel was convened at plaintiffs' request to determine the issues presented. This panel granted defendants' (respondents), motion to dismiss. Plaintiffs appealed this ruling to the United States Court of Appeals for the Seventh Circuit which dismissed the appeal for lack of jurisdiction.

28 U.S.C. Section 1291 provides that the Court of Appeals has jurisdiction over all final decisions of district courts except where review may be had in the United States Supreme Court. 28 U.S.C. Section 1253 provides that any party may appeal to the United States Supreme Court from an order granting or denying an interlocutory or permanent injunction in any civil action that is properly heard by a district court of three judges.

It is clear that the instant case having been decided by a properly assembled three judge panel pursuant to plaintiffs' motion, was directly appealable to this Court

pursuant to 28 U.S.C. Section 1253, and therefore the Court of Appeals lacked jurisdiction under 28 U.S.C. Section 1291. See: *Bogue* v. *Faircloth,* 441 F. 2d 623, (C.A. Fla., 1971); *Coleman* v. *Yokum,* 442 F. 2d 351 (C.A. La., 1971); *Oldroyd* v. *Kugler,* 461 F. 2d 142 (C.A. N.J., 1972); *Haining* v. *Roberts,* 453 F. 2d 1223 (C.A. Miss., 1971); *Mayhues Super Liquor Store, Inc.* v. *Meiklejohn,* 426 F. 2d 142 (C.A. Fla., 1970); *Skolnick* v. *State Electoral Board of Illinois,* 336 F. Supp. 839, 872 (N.D. Ill., 1971).

Petitioners contend that the District Court never considered the issue of injunctive relief, thus the matter was properly appealed to the Court of Appeals. Petitioners place an overly technical interpretation on the District Court's ruling. As was stated in the Seventh Circuit's order dismissing the appeal, (Appendix, A-21-22, Petition), when the District Court dismissed the complaint the dismissal "denied both injunctive and declaratory relief since both types of relief were requested" in the complaint. To follow petitioners' argument to its logical conclusion would lead to an assertion that since the District Court dismissed only the declaratory portions of the complaint the action still remains as to injunctive relief, and accordingly there is no final judgment from which to appeal.

Petitioners sought both injunctive and declaratory relief. When the District Court dismissed the case it dismissed all claims asserted in the complaint. It is unrealistic to characterize the District Court's ruling as only denying declaratory relief.

To support their argument, petitioners primarily rely on *Mitchell* v. *Donovan,* 398 U.S. 427 (1970) and *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820 (1970) which is based upon *Goldstein* v. *Cox,* 396 U.S. 471 (1970).

These cases are distinguishable from the instant matter. In *Mitchell,* (supra), appellants had been granted the injunctive relief which they sought, and were thus only appealing from the District Court's denial of their request for declaratory relief.

In *Goldstein,* (supra) upon which *Rockefeller,* (supra), relies, the issue was whether the District Court's *interlocutory* order denying summary judgment to plaintiff who had requested *permanent injunctive relief* was an appealable order within the meaning of 28 U.S.C. Section 1253. The Court held that its jurisdiction under Section 1253 to review interlocutory orders extended only to those orders granting or denying *preliminary* injunctions, and since the District Court's interlocutory order did not decide a question of *preliminary* injunctive relief the Court did not have 1253 jurisdiction. (396 U.S. at pp. 475-476).

There is no question that had the *Goldstein* order been final rather than interlocutory this Court would have had jurisdiction under Section 1253. This is clearly stated in the first sentence of Justice Douglas' dissenting opinion. (396 U.S. at pp. 675-676). Justice Douglas stated:

> "If summary judgment had been granted to appellant, there would be no question but that this Court would have jurisdiction under 28 U.S.C. 1253 over an appeal from that judgment as it would constitute 'an order granting * * * an interlocutory or permanent injunction.'"

Just as a final order *granting* summary judgment in *Goldstein* would have invoked this Court's jurisdiction under 28 U.S.C. Section 1253, so did the final order granting respondents' motion to dismiss in the instant cause. In both instances, the hypothetical one in *Goldstein,* and the situation herein, such rulings are final orders

either granting or denying permanent injunctive relief, thus invoking this Court's jurisdiction under Section 1253.

For the reasons stated herein, *Mitchell,* (supra), *Rockefeller,* (supra) and *Goldstein,* (supra) do not support petitioners' contention, and respondents respectfully submit that the Court of Appeals properly dismissed petitioners' appeal for lack of jurisdiction.

B.

A Properly Convened Three Judge Panel Decided This Cause In The District Court.

Petitioners next assert that since the three judge court dismissed the case for failure to state a claim, the panel's ruling was the same as overturning the action of the single judge convening the panel. (Petition, pp. 5-6). Respondents submit that assertion is clearly erroneous and petitioners' reliance on *Wilson* v. *City of Port Lavace,* 391 U.S. 352 (1968) and *Mengalkoch* v. *Industrial Welfare Commission,* 393 U.S. 83 (1968) is misplaced.

Those cases simply hold that where a three judge court determines it was improperly convened because the case did not present issues which require determination by three judges pursuant to 28 U.S.C. 2281*, and the panel

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* 28 U.S.C. Section 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such

remands the case for determination by the single judge, appeal from the single judge's ruling dismissing the case is properly taken to the Court of Appeals.

This instant appeal is from a decision of a *properly* convened three judge panel, not from a single judge. Thus, *Wilson* (supra) and *Mengalkoch,* (supra) are inapplicable to this cause.

C.

Petitioners Sought To Declare Unconstitutional And Restrain The Operation Of An Illinois Statute Of Statewide Application.

Finally, petitioners reverse their District Court position and now contend that the statute they attack does not have statewide application, and therefore their Complaint may have been appropriate for determination by a single judge rather than a three judge panel. An examination of the complaint indicates that petitioners asked the District Court to declare the statute unconstitutional on its face. (Appendix, C-12, Petition). Unquestionably, if the statute would have been declared unconstitutional on its face it would have been unconstitutional throughout the State of Illinois and not just Cook County. Thus, petitioners' contention A(3), (Petition, p. 6), is without merit.

II.

THIS COURT SHOULD NOT ACCEPT THIS MATTER PURSUANT TO 28 U.S.C. 1253, 2103.

The relief requested by petitioners is in the alternative. On one hand, they ask the Court to review the ruling of

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statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

the Court of Appeals pursuant to 28 U.S.C. 1254(1). On the other hand, they ask the Court to treat their petition as a jurisdictional statement pursuant to 28 U.S.C. 2103 and reverse the District Court's ruling pursuant to 28 U.S.C. 1253.

Plaintiffs are barred from seeking review at this juncture since their application to this Court under 28 U.S.C. Section 1253 is untimely. The proceedings in the District Court were concluded on February 9, 1973. Plaintiffs' failure to seek review in this Court until September 10, 1973 far exceeds the statutory ninety day period provided in 28 U.S.C. Section 2101(c) for review pursuant to 28 U.S.C. 1253.

It is no excuse that plaintiffs appealed to the wrong court. They should have lodged a protective appeal with this Court at the same time they appealed to the Seventh Circuit. Plaintiffs have not cited any authority supporting their position that a party who erroneously appeals to the Court of Appeals should obtain relief for their error by having this Court accept an untimely application under 28 U.S.C. Section 1253.*

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*Respondents are aware of this Court's discretionary authority when a party has erroneously appealed to this Court when appeal should have been directed to the Court of Appeals. In those cases this Court will usually vacate the lower court's ruling and allow a fresh decree to be entered so a timely appeal can be lodged in the Court of Appeals. *Moody* v. *Flowers*, 387 U.S. 97 (1967). However, respondents are not aware of any authority allowing similar relief when a party erroneously seeks review in the Court of Appeals, when review should have been sought in this Court.

III.

EVEN IF THE COURT ACCEPTS JURISDICTION UNDER 28 U.S.C. SECTION 1253 AND TREATS THE PETITION AS A JURISDICTIONAL STATEMENT, THE DECISION OF THE DISTRICT COURT SHOULD BE SUMMARILY AFFIRMED BECAUSE THE QUESTION PRESENTED IS INSUBSTANTIAL AND DOES NOT REQUIRE OR WARRANT FURTHER ARGUMENT.

Both state and federal courts have unanimously held that an accused indigent's constitutional rights are not violated because he is provided with court appointed counsel by the same judge before whom he must appear. *Ex Parte Hough,* 12 Cal. 2d 522, 150 P. 2d 448 (1944); *State* v. *Reid,* 146 Conn. 227, 149 A. 2d 698 (1959); *United States ex rel. Reid* v. *Richardson,* 277 F. 2d 702 (2nd Cir., 1960); *Lane* v. *Brown,* 372 U.S. 477 (1963).

The effectiveness of counsel is not a function of or even related to the method by which counsel is appointed, so long as he is a qualified attorney able to dedicate himself to his client's cause. *United States ex rel. Weber* v. *Ragen,* 176 F. 2d 579, 586 (7th Cir., 1949); *Cert. denied,* 338 U.S. 809 (1949). Any system of appointing counsel can be a vehicle for improper influence if the attorney is not dedicated to his client. The best check on the indigent's right to effective counsel is on the one hand, the conscience of the attorney himself, who is bound by his oath of professional responsibility to protect his client's interests, and on the other, by the vigilant supervision of the Courts which are bound to protect the indigent's right to effective counsel.

Four states, including Illinois, empower the judiciary to appoint the public defender. (Indiana's Acts 1945, Ch. 38, Section 1; Burns Ind. An. Stat., 1969, § 13-1401-1404; Conn. Gen. Stat., D 54-80; Mass. An. Law, Ch. 221, § 534 D (Supp. 1965). Additionally, the Federal Public Defender is appointed by the judicial council of the circuit, which also fixes his compensation and the number of assistant attorneys and other employees he may hire. (18 U.S.C. § 3006 A (h) 2(A), as amended 84 Stat. 916 (1970)). Furthermore, neither the Model Public Defender Act nor the American Bar Associations Standard Relating to the Prosecution Function and the Defense Function discourage the judicial method of appointment. (Model Defender Act, § 2; ABA Project on Standards for Criminal Justice, "Standards Relating to the Prosecution Function and the Defense Function" (Institute of Judicial Administration, 1970, p. 157, p. 173; See: *Johns* v. *Smyth*, 176 F. Supp. 949 (E.D. Va., 1939).

Both state and federal courts have upheld the constitutionality of the Connecticut statutory scheme which provides for the appointment, termination, fixing of salaries, and regulation of the public defender by the judiciary. (*State* v. *Reid*, 146 Conn. 227, 149 A. 2d 698 (1959); *United States ex rel. Reid* v. *Richardson*, 277 F. 2d 702 (2nd Cir., 1960)). In the state case, the court declared that the primary reason for judicial appointment of such officials was to insulate them from improper pressure from any source. In the federal case, the Court of Appeals for the Second Circuit flatly rejected defendant's contention that the Connecticut system denied him the right to effective counsel. The Court stated at p. 703:

> "Even though the public defender is appointed by the same judges who will hear cases in which he participates, and even though these same judges fix the

public defender's salary and term of office, the Connecticut Public Defender System is not violative of due process requirements of the Constitution."

Lee Silverstein's study, *Defense of the Poor in Criminal Cases in American State Courts* (American Bar Foundation, 1965, Vol. 2, pp. 109-120) included a study of the Connecticut Public Defender System. Each public defender was asked the following question:

> "Some lawyers say that the public defender cannot be completely independent and zealous in representing indigents because he is just another public official paid from the same source as the judge and the state's attorney. What do you think about this?"

All public defenders said the statement was false. (p. 115). One of them said:

> "The public defender is first a lawyer, dedicated to his client's cause. That he is paid by public funds is immaterial. There are no pressures, no fears of losing a job. Financially to lose such a job would be a favor. The whole system is as it should be — based upon the people who operate it and their personal dedication." (p. 115)

A contention that defendant was improperly or inadequately represented by the public defender, based on the concept that the public defender and prosecutor are both "state officials" and therefore likely to be in collusion, or that the public defender is in some way subject to the control of the judiciary or of prosecuting authorities was rejected in *Ex Parte Hough,* 12 Cal. 2d 522, 150 P. 2d 448, (1944). The Court reasoned that when the public defender was appointed to represent the petitioner, he became the attorney for the petitioner to the same extent as if employed by the petitioner, so that the judge of

the trial court had no more authority or control over him than any other attorney practicing before his court.

A recent study declared "Cook County to be a leader among metropolitan areas in the provision of counsel and other services to indigent persons accused of crimes." (Dallin H. Oaks and Warren Lehman, *A Criminal Justice System and the Indigent — A Study of Chicago and Cook County.* (University of Chicago Press, 1968, p. 150). In this regard it is worthwhile to point out the expansion of the Public Defender's office in the past several years. The Cook County Public Defender's budget for 1964 was $258,214.52, which provided for a total of 32 employees, including 21 assistant public defenders. The 1971 budget was $1,433,391.00, providing for a total of 101 employees including 72 assistant public defenders.

The citations relied upon by petitioners, (Petition, pp. 7-8) stand for no more than the proposition that a defendant is entitled to competent and unprejudiced representation under the United States Constitution. However, those cases provide no authority for invalidating the Illinois Public Defender Act. Furthermore, petitioners' analysis of the pleadings contained in the first sentence on page 7 of their petition is incorrect. Petitioners state:

> "The complaint alleges, and the motion to dismiss admits for purposes relevant here, that the appointment system of the public defender, and each of his assistants, by decision of the trial court deprives an indigent person represented by the public defender of the full services of counsel."

Unquestionably, that statement is a legal conclusion and not a well pleaded fact. Unarguably, that is the primary issue of the lawsuit. Since a motion to dismiss admits only well pleaded facts it is incorrect to state that

that legal conclusion is admitted by respondents' motion to dismiss. Perhaps the most succinct analysis of the issue presented by petitioners' complaint is made by Judge Philip W. Tone in his concurring opinion, where he states:

> "Inherent in plaintiffs' arguments is the assumption that some other authority, whether elected officials or the people directly, would be more likely than judges to insure independent and faithful representation of indigent persons accused of crime. Illinois is not required to base its indigent defense program on that assumption."

Based upon the foregoing, respondents respectfully submit that the decision of the District Court should be summarily affirmed because the question presented is insubstantial and does not require or warrant further argument.

IV.

PETITIONERS SHOULD NOT BE ALLOWED TO PROCEED *IN FORMA PAUPERIS*.

Proceedings *in forma pauperis* are governed by 28 U.S.C. § 1915, which states in pertinent part:

> "Any Court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, *by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.*" (Emphasis supplied)

Furthermore, proceedings *in forma pauperis* in this Court are governed by Supreme Court Rule 53, which provides in part:

> "Any party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave so to proceed, together with his affidavit setting forth facts showing that he comes within the statutory requirements. See 28 U.S.C. 1915, *Adkins* v. *DuPont Co.*, 335 U.S. 331."

In support of petitioners' Motion To Proceed *In Forma Pauperis,* they have failed to comply with statutory requirements in that the supporting affidavit is insufficient. The affidavit fails to comply with either 28 U.S.C. Section 1915(a) or Supreme Court Rule 53 because it is not petitioners' affidavit but that of their attorney. It is clear that a supporting affidavit must be that of the party or litigant involved, not his attorney. See: *Stern & Gressman, Supreme Court Practice,* Fourth Edition, 1969, Section 8.5, P. 370.

Additionally, it should be noted that petitioners did not proceed *in forma pauperis* in the District Court. Based upon the foregoing, respondents respectfully submit that petitioners should be denied leave to proceed *in forma pauperis.*

CONCLUSION

Based upon the foregoing, respondents respectfully submit:

1. That the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

2. That this Court should not accept jurisdiction of this matter pursuant to 28 U.S.C. Sections 1253, 2103.

3. That even if the Court accepts jurisdiction under 28 U.S.C. 1253 and treats this petition as a jurisdictional statement, this Honorable Court should affirm the judgment of the United States District Court for the Northern District of Illinois in that this cause fails to present a substantial question and does not warrant further argument.

4. That petitioners should be denied leave to proceed *in forma pauperis.*

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DECISION AND ORDER

Plaintiffs have filed a declaratory judgment action to contest the constitutionality of the Illinois Public Defender Act (1971, *Ill. Rev. Stat.*, Ch. 34, §§ 5601-5608). The action lies under 42 U.S.C. § 1983, and a three-judge court has been properly convened, over defendant's objection.

Plaintiffs seek to represent a class consisting of all indigent defendants awaiting trial in criminal cases who are defended by the Public Defender's office and who may be sentenced to more than 6 months in prison. Presumably, in view of *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S. Ct. 2006 (1972), the class could be expanded to defendants in all criminal cases who have public defenders.

Plaintiffs also seek to sue defendant Boyle as a class representative of all judges of the Circuit Court of Cook County, Illinois. Although the statute is of state-wide applicability, plaintiffs attack it on the grounds of defendant Boyle's administration of the statute in Cook County as well as being unconstitutional on its face. Because of the territorial limit of the defendant's jurisdiction and because we find the statute to be constitutional, we see no need to give advance notice of hearing to the Governor or Attorney General of Illinois pursuant to 28 U.S.C. § 2284(2).

Defendant has conceded in his brief that both the plaintiff and defendant are proper for an adjudication of

whether or not the statute is constitutional on its face but has moved to dismiss the complaint for failure to state a claim upon which relief can be granted and also to strike some portions of the complaint which apply specifically to the administration of the statute in Cook County. Since we have decided that the complaint should be dismissed for failure to state a claim, it follows that the acts of defendant Boyle taken pursuant to the statute likewise fail to afford a basis for a claim upon which relief can be granted.

According to the complaint, the Illinois Public Defender Act gives the judges of the Circuit Court the power to appoint the Public Defender and, through him, to determine the number, qualifications and tenure of the attorneys who represent indigent defendants in criminal cases (cf. Sections 5602 and 5606). The complaint alleges that the judges have established a committee to exercise these responsibilities and that Chief Judge Boyle has taken over most of them himself, including the administration of the Public Defender's budget and payroll. In substance, plaintiffs complain that control of the Public Defender's office by the judges who preside over criminal trials deprives them of constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

For the purposes of defendant's motion, we assume that Chief Judge Boyle and his fellow judges have taken the specific actions alleged in the Complaint. We cannot agree, however, that this statute or the defendant's actions deprive the plaintiffs of their right to competent and independent counsel. Although the Circuit Court does have more control over the Public Defender's office in Cook County than it has over the State's Attorney or

private counsel, all members of the bar are officers of the court and are subject to its supervisory and disciplinary powers. Therefore even if the public defenders were chosen in some other way, they would still be subject to ultimate and substantial judicial supervision.

The basic difficulty with plaintiffs' Complaint is that the statute on its face does not deprive plaintiffs of any rights under the Constitution. Any system of selecting and supervising public defenders, if it is to be reviewed for fairness and efficacy at all, will necessarily be reviewed by the courts. We can see little difference, in practice, whether the system is established in the first instance by the courts or by some other agency: since the judges are entrusted with the duty to review the system constitutionally, they can be trusted to create it within the confines of a statute. If this is to say that the judges are judging themselves, the response is that they themselves are bound by the Constitution which they have the duty to enforce.

Plaintiffs do not allege that their defense attorneys are incompetent or prejudiced. Such a complaint can be made in the trial court either before or after trial, and the individual judge to whom the case is assigned is bound to grant appropriate relief. Cf. Ch. 38, Sec. 113-3(b) of the *Illinois Revised Statutes* (1971). Nor do plaintiffs complain that the Public Defender appointed by the judges, nor any of his staff, are incompetent or prejudiced, or that they are underpaid or that the office is understaffed. The allegations of the complaint to this effect are conclusory and in large part prospective. Hence we are not presented with a case in which any individual is alleging that he has been prejudiced by a deprivation of his rights.

As to the specific deficiencies which are alleged to have occurred in Cook County, particularly Judge Boyle's take-over of the payroll work by his letter of January 26, 1972, suffice it to say that none of his acts are alleged to violate the statute. If the statute is valid, his acts pursuant to it must be valid also. The appropriation of funds, furthermore, is made by the County Board, not by the judges. Finally, we fail to see how a statewide statute could be invalidated by proof that one circuit has violated it.

Plaintiffs also allege that since most of their class are blacks, the Illinois statute "creates an invidious discrimination against black persons." This is a *non-sequitur*. The statute does not create any discrimination, and if it should result in discrimination because the Chief Judge appoints a bigoted or incompetent Public Defender, plaintiffs' remedy is in the trial court or at the polls, not in an attack on the constitutionality of the statute.

A few courts have approved public defender systems similar to Illinois'. In *United States ex rel. Reid* v. *Richmond*, 277 F. 2d 702, 703 (2nd Cir. 1960), the court agreed with the district court that the Connecticut system of appointment and supervision by the judiciary did not violate due process. Likewise in *Ex Parte Hough*, 12 Cal. App. 2d 522, 150 P. 2d 448 (1944), a state court held that an attorney appointed through the County Board to represent an indigent defendant was no more under the control of the trial judges or prosecution than any other lawyer with respect to his undivided duty toward his client. The court added at 150 P. 2d 451-2 that absent this freedom from control, the defendant's Sixth Amendment right would be violated. Both of these decisions, incidentally, involved capital cases.

The citations relied upon by plaintiffs stand for no more than the proposition that a defendant is entitled to competent and unprejudiced representation under our Constitution. There can be no dispute on this point. In *Zurita* v. *United States,* 410 F. 2d 477 (7th Cir. 1969), the defendant's personal attorney also allegedly represented the victim of the crime in another capacity. Acc. *People* v. *Stoval,* 40 Ill. 2d 109 (1968). Such cases provide no authority for invalidating the Illinois Public Defender Act even assuming, *arguendo,* that one of the appointees might permit himself to acquire a conflicting interest. This is his impropriety, not the statute's.

A class action for all similarly situated plaintiffs would be kaleidoscopic in nature, with new members added daily to serve no particular purpose. The present plaintiffs are adequate to test the constitutionality of the Act. If any member of the alleged class believes his attorney, public or private, has a conflict of interest, he has the right and privilege to file his own complaint under the Illinois Post-Conviction Hearing Act, or ultimately in this court, assuming that he failed to obtain pre-trial relief.

As to a class of defendants, we see no need to bring in all 130 or so judges of the Circuit Court of Cook County, and Judge Boyle is not alleged to be a representative of any other circuit court judges in Illinois. Since this defendant properly represents the Circuit Court of Cook County as a governmental entity and since our decision will not adversely affect the interest of any other judge individually, we will terminate this litigation with the present parties only. See *Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 299 F. Supp. 117, 124 (S.D.N.Y. (three judge court), 1969), affirmed, 401 U.S. 154 (1971).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion to determine plaintiff and defendant classes is denied and the Complaint is dismissed.

The clerk is directed to send a copy of this Decision to the Governor and Attorney General of Illinois by registered mail, in addition to the mailing to the parties.

Enter:

ROGER J. KIELY,
Circuit Judge.

THOMAS A. McMILLEN,
District Judge.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROSEMARY DOCKERY, et al.,
Plaintiffs,
v.
JOHN S. BOYLE, etc.,
Defendants.
No. 72 C 438

TONE, District Judge, concurring.

While I concur in the Court's Decision and Order, my reasons for doing so require some additional explanation.

Plaintiffs' challenge to Illinois' method of meeting its obligation to provide counsel for indigent defendants in criminal cases is addressed to the statute on its face and also to the statute as applied by the judges of the Circuit Court of Cook County[1]. It is to be noted that

1. On its face the statute provides that the Public Defender shall be appointed by a majority of the Circuit Judges to serve at their pleasure (Ill. Rev. Stats., 1971, Ch. 34, § 5606); that the judges shall fix the number of assistants, who shall be appointed in such manner as the judges shall direct (§ 5602); that the Public Defender shall appoint the assistants, who shall serve at his pleasure (*ibid.*); that the County Board shall appropriate funds to defray the necessary expenses and pay the salaries of the Public Defender and his staff (§§ 5605, 5606, 5607); and that the Court may appoint counsel other than the Public Defender for an indigent defendant at his request or with his consent, and shall appoint other coun-

none of the actions which are challenged as applications of the statute are specifically authorized by the statute. Nor does the statute contain any general language authorizing the Chief Judge or a majority of the judges to supervise or control the operation of the Public Defender and his assistants. The only authority granted to the Circuit Judges by the statute is to appoint and remove the Public Defender himself, to determine the *manner* of appointing assistants, and to determine how many assistants are "necessary for the proper discharge of the duties of the office." (Ill. Rev. Stats., 1971, Ch. 34, §§ 5602, 5606.) The Public Defender is to appoint the assistants and remove them and determine the number of clerks and other employees that are necessary and appoint them. (§ 5606.) The County Board fixes the salaries of the Public Defender and his assistants and the remainder of his staff (§ 5606) and pays those salaries and the expenses of the

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sel upon a showing of cause for doing so (§ 5604; see also Ch. 38, § 113-3(b)).

Plaintiffs allege in their complaint that the judges have taken the following actions in purported application of the statute: establishment by the judges of a committee to screen and approve or disapprove applicants for positions as assistants to the Public Defender; exercising surveillance over the fiscal administrative and professional operations of the office by assigning a member of the Chief Judge's staff to conduct an investigation of the Public Defender's Office; review and approval or disapproval by the Chief Judge of the Public Defender's annual budget before the latter submits it to the County Board; and the assumption by the Chief Judge of payroll work and authority to approve or disapprove changes in the payroll account and changes of grade and salary steps of personnel of the Public Defender's Office.

office[2]. (§§ 5605, 5606, 5607.) The Public Defender is required to report to the County Board, not to the Circuit Court. (§ 5608.)

It is accordingly doubtful that the actions allegedly taken by the judges are provided for or authorized by the statute. The judges may well have believed they were acting pursuant to an inherent judicial power to insure the adequacy of the representation of indigent defendants in their court. The reason this distinction matters is that if the judges' actions are outside the statute, the need for, if not the jurisdiction of, the three-judge court ends with a determination that the statute is constitutional on its face. Compare *Napolitano* v. *Ward,* 317 F. Supp. 79, 81-82 (N.D. Ill. 1970) with *Query* v. *United States,* 316 U.S. 486, 490 (1942). To justify addressing all the issues presented, I am willing to assume what to me is doubtful, *viz.,* that the statute provides for the supervisory activities undertaken by the Circuit Judges and that those actions are a reflection of the statute "as applied." I shall therefore not attempt to distinguish from this point on between what the statute provides for and what the judges allegedly have done.

The question we have to decide is whether the means chosen by Illinois for the discharge of her obligation to provide effective counsel for indigent defendants is inadequate for that purpose. If the means adopted by the state is to be adequate, the defense legal officer provided by the state has to be appointed or chosen by somebody,

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2. Only in counties of less than 500,000 population does the presiding judge of the Circuit Court have authority to approve expenses as necessary and proper, and that provision does not apply in the case before us. (§ 5607.)

he has to be answerable to somebody who is in a position to judge his performance, and he has to be removable by somebody if he is not doing his duty. Before the state dealt with the subject by statute, the duty of appointing and supervising counsel for indigents fell on the judiciary by default. This continued to be true as the constitutional requirement of representation by counsel was extended from capital cases to less serious offenses. With the need for court-appointed counsel in larger numbers and in more cases came the necessity of insuring the availability of counsel and compensating them. Illinois solved this problem by providing for appointment by the court of a Public Defender, who, with his staff, is compensated and reimbursed for expenses with public funds appropriated by the County Board. In addition, Illinois, whether by statute or judicial action, allows the authority to supervise this court-appointed counsel's operations to repose where it has always been, in the court.

The state could have solved its problem in other ways. It could have provided for the popular election of the Public Defender in the same manner as the State's Attorney, to whom plaintiffs point as a legal officer enjoying greater independence than the Public Defender. Or the Public Defender could be appointed by one or more elected officials. But there is good reason to believe that direct answerability to the electorate or to an elected official would often place impermissible pressures on an officer who is often required to represent unpopular causes and persons who are widely believed to be deserving of nothing except sure conviction and punishment. It is not unreasonable for Illinois to determine that the court is the instrumentality of government which can best insulate the defense legal officer from these

pressures and which, through the training and experience of its personnel, is best able to understand, tolerate, and indeed encourage the conduct which duty, imposed not only by the Constitution but by the highest traditions of the profession, requires of defense counsel.

I turn to plaintiffs' allegations as to the consequences of the Illinois statute and the judges' actions complained of as allegedly depriving plaintiffs of due process and equal protection. (Complaint, par. 11.) With the single exception noted below, these are not allegations of fact, which if supported by evidence would entitle plaintiffs to relief, but argumentative statements. Thus it is said (1) that the judges' power to determine the number of assistants "may be" exercised to reduce "the expenses of the Court";[3] (2) that an assistant "may be" transferred to a different courtroom if he incurs the displeasure of a judge; (3) that criticism by a judge of an assistant "will necessarily affect adversely, or be thought to affect adversely," their opportunities for promotion; (4) that the judges' control over the office of Public Defender will put the assistants under pressure to encourage pleas of guilty and to fail to "note errors during trial to preserve their record on appeal"; (5) that the Public Defender "will necessarily" select the assistants the judges approve and not those who in his opinion are best qualified; and (6) that the Public Defender "will expend its funds, not necessarily so as to secure the best results for [his] clients, but so as to cause the least controversy with the Chief Judge over the propriety of particular items of expenditure."

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3. The statute provides for payment of the expenses of the Public Defender directly by the County Board, a point plaintiffs' argument ignores.

Turning first to item (1) in the above list, the judges are given a statutory standard for determining the number of assistants, *viz.*, "such number . . . as such judges shall deem necessary for the proper discharge of the duties of the office." It is not to be presumed that the judges will violate the duty imposed upon them by statute. Nor is it enough to state such a violation of duty to allege, as plaintiffs do, the mere conclusion that the authority this statute gives the judges not only "may be" but "has been exercised" in the interest of economy "so as to keep the office of Public Defender perptually understaffed in relation to the requirements of its workload." A charge of deliberate violation by a majority of the judges of the Circuit Court of an important obligation specifically imposed on them by statute must be supported by allegations of fact; the mere conclusion is not enough.

Plaintiffs' other arguments as to the consequences of the Illinois system, being arguments, are not allegatioins of fact which require an evidentiary hearing. These arguments are based on the presumption that neither the judges nor the Public Defender or Assistant Public Defenders will behave like judges and lawyers. Essentially the same arguments can be made against the Federal Defender system used in this Court or against any system under which counsel for indigents are appointed by and answerable to the court. Inherent in plaintiffs' arguments is the assumption that some other authority, whether elected officials or the people directly, would be more likely than judges to insure independent and faithful representation of indigent persons accused of crime. Illinois is not required to base its indigent defense program on that assumption.

United States District Judge

Dated: November 28, 1972